REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

COMMERCIAL AND ADMIRALTY DIVISION

CASE NO. 466 OF 2005

FIT TIGHT FASTENERS LIMITED.....PLAINTIFF

VERSUS

AKIBA BANK LIMITED.....DEFENDANT

JUDGEMENT

1. The fate of this suit may turn on the Provisions of Section 3(3) of The Law of Contract Act which reads:-

> "3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
>
> (a) the contract upon which the suit is founded—
>
> (i) is in writing;
>
> (ii) is signed by all the parties thereto; and
>
> (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
>
> Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust".

2. Akiba Bank Limited (The Bank) advanced certain facilities to Hardware and Tools Limited (the Borrower) for which Sundev Investment Limited (The Company) stood as Guarantor. In support of the Guarantee, the suit property was charged to the Bank. As sometimes happens, there was default on the part of the Borrower and the Bank placed the Borrower under Receivership. In addition it placed the Guarantors property under Receivership.

3. The Receiver Manager put up the suit property for sale and by a letter dated 30th June 2014, the Receiver Manager accepted the offer of Fit Tight Fasteners Ltd (Fit Tight) to purchase the land and other assets which included the Trading Stock, Furniture and Fixtures and a forklift for Kshs.45 million. Fit Tight made a payment of 10% as deposit thereof through a cheque forwarded to the Receiver Manager on 11th August 2004.

4. In the Transaction that was to follow the Law firm of Kipkorir, Titoo & Kiara (KTK) represented the Bank while Fit Tight were represented by Jones & Jones Advocates. There was an exchange of correspondence between the two firms in which one issue stood out. There was a Tenant in the property and Fit Tight were keen on buying the property with vacant possession while Bank was not able to guarantee it. After considerable to and fro, the Firm of Kipkorir, Titoo & Kiara through a letter of 11thMay 2005, indicated that after a discussion between the parties, Fit Tight had agreed to Execute the Sale Agreement without the vacant possession clauses. The firm of Jones & Jones on the very same day confirmed that indeed their Client will not insist on actual vacant possession. Things seemed to be moving forward.

5. On 26th May, 2005, the Firm of Kipkorir, Titoo & Kiara sent a Sale Agreement to the firm of Jones & Jones for Execution by Fit Tight. On 30th May 2005, Jones & Jones informed the firm of Kipkorir, Titoo & Kiara, that their Clients had executed the Agreement on 27th May 2005 and on request of the Receiver Manager had handed over the Agreement for Execution by the Bank.

6. Somehow on 21st July 2005 Jones & Jones forwarded the Sale Agreement in triplicate to Kipkorir, Titoo & Kiara duly executed for execution by the Bank but the same were never returned. That persisted. This state of affairs prompted Fit Tight to file this suit.

7. After the suit was filed there were two developments of considerable importance. On 13th September 2005, the Bank refunded the Deposit to the Fit Tight. Secondly the suit property was sold to a third party Ital Products Limited (**Ital**) and duly transferred in its favour on 28th October 2005. Although Fit Tight enjoined Ital to these proceedings the suit against it and the Receiver Manager was struck out in a Ruling by Hon. Ochieng J. on 31st January 2007.

8. Prior to that Ruling, Fit Tight had sought the following prayers:-

1) An Order that the Defendants do execute the Agreement of Sale.

2) An Order for Specific performance.

3) An Order for an injunction restraining the Defendants by themselves and/or their servants and agents from alienating, charging, letting, renting, selling and/or disposing or in any manner or way dealing with the property being LR Number 209/8194 Nairobi, the stock and forklift belonging to Sundev Investments Limited pending the hearing and determination of the suit.

4) An Order that the Defendants do hand over all Title Deeds pertaining to the property being L.R. Number 209/8194.

However, the Ruling limited the issues that remained unresolved to Damages, costs and interest.

9. Fit Tight submitted that Akiba are guilty of holding the money for over one year thereby keeping the Plaintiff out of use of its own money and denying it an opportunity to invest the money in other ventures. Fit Tight assert that they are entitled to compensation by way of damages. The Decision in Veronicah Wanjiru vs. Samuel Ikumbu & 2 others [2014] eKLR is in support of the proposition that a Purchaser is entitled to recover damages at large where a Seller refuses to implement an Agreement for any reason other than defective Title.

10. As to the quantum of Damages it was proposed by the Fit Tight the Sale Agreement drawn by the Defendant's own Advocates contemplated a 15% interest and so an award of damage would therefore be interest on the money from the time it was deposited upto the time it was refunded. It was worked out as follows:-

4,500,000 x 15 x398/100x365 – 736,027

To this sum, it was proposed that interest at Bank rates be added until payment in full.

11. Citing various Decisions, the Bank submitted as follows:-

i. Vide the ruling dated 24.08.05, Hon. Lady Justice in dismissing the Plaintiff's application for temporary injunction held that the material Sale Agreement was not signed, and thus no agreement.

ii. Vide the ruling dated 31.01.07, Hon. Justice Fred Ochieng allowed our application to strike out substantial parts of the Plaint including all prayers except the prayer for "Damages for breach of contract".

iii. The Law is clear that a Sale Agreement that is not duly executed as provided in the applicable statute is not an agreement and is not binding.

iv. The Law is clear that General Damages are not available for breach of contract even if the breach is proved.

12. There is evidence that prior to executing the Sale Agreement, Fit Tight paid the deposit of Khs.4,500,000 on 11th August 2004. However, because of lengthy negotiations of the terms of the Sale Agreement that was to embody the transaction it was only 9 months later or so, on 26th May 2005, that the Bank through its Lawyers (Kipkorir, Titoo & Kiara) sent a Sale Agreement to the Lawyers of Fit Tight for execution. Then on 21st July 2005, the Lawyers for Fit Tight wrote as follows:-

21st July, 2005

Norah Mutuku

M/s Kipkorir, Titoo & Kiara

Advocates

Posta Plaza

University Way, Uhuru Highway

P.O Box 10176

NAIROBI-00100

Attention: Miss Norah M. Mutuku

Dear Madam

Re: Sale of L.R No.209/8194 to Fit Tight Fasteners Limited.

We are glad to write to you that our client has executed the Agreement for Sale and we herewith forward the same in triplicate for execution by your clients.

Kindly return to us a copy as soon as the same is executed by your clients and stamped by the Lands Department.

Your faithfully

Signed

JONES & JONES

Encl: Agreement in triplicate.

CC. The Directors

Fit-tight Fasteners Ltd

P.O. Box 22036

Nairobi

13. The Bank cannot be blamed for holding the deposit prior to this date because the terms of the Sale Agreement had not been settled and as there was no demand for its return by Fit Tight. It would seem that Fit Tight was happy to leave the money with the Bank as it was expected that the deal would be closed. Of course, we now know, this did not happen. However on 21st July, 2005, Fit Tight returned the Sale Agreement as drafted by the Bank's Lawyers and so it was patently unfair and improper for the Bank to hold on to the deposit without executing its part of the Agreement. If the Bank was no longer keen on proceeding with the transaction then it should have refunded the deposit immediately after 21st July 2005.

14. There was uncontroverted evidence by Mr. Kanyaiyalal Mansukhlal Goradia, on behalf of Fit Tight, that the Bank made the refund on 13th September 2005 about (1) month after this suit had been filed.

15. It would seem logical and just that Fit Tight be compensated for the period when the Bank wrongfully held on to the deposit but the pleadings by Fit Tight placed a difficulty on its own path. In prayer 7, which survived the striking out Order by Ochieng J., Fit Tight bespeaks,

> "**Damages for breach of Contract in lieu or in addition to specific performance".**

This prayer rests on the Sale Agreement. But the Sale Agreement was not executed by the Bank, at least none was shown to Court. As the transaction involves disposition of an interest in land, the Sale Agreement cannot be a foundation for the claim as it was not signed by all the parties thereto, (Section 3(3) of The Law of Contract Act). In that event a Claim for Breach of Contract cannot be sustained.

16. The Bank also asserted that the Claim by Fit Tight would fail because General Damages are not awarded for breach of Contract. The Bank would be relying on the General proposition that the purpose of Damages for Breach of Contract, subject to the Principle of mitigation, is to put the Claimant as far as possible in the same position he would have been if the breach complained of had not occurred (See for example Kenya Industrial Estates Ltd vs. Lee Enterprises Ltd [2009] eKLR). Those Damages would not be in the nature of Damages at large or General Damages but of Special Damages which require specific pleading and proof.

17. But my observation is that the stereotype that there can never be General Damages for breach of Contract may soon be a thing of the past. See the following passage from the Decision of the Court of Appeal in Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited [2016]eKLR,

> "On the second issue, the appellant conceded that whereas the general legal principle is that courts do not normally award damages for breach of contract, there are exceptions such as when the conduct of the respondent is shown to be oppressive, high handed, outrageous, insolent or vindictive. In support of this proposition, the appellant relied on the ***Nigerian case*** of ***Marine Management Association & Another vs National Maritime Authority (2012) 18 NWLR 504***.
>
> The respondent on the other hand maintained that there cannot be any award of general damages for breach of contract and placed reliance on the following authorities; ***Provincial Insurance Company EA Ltd v. Mordekai Mwangi Nandwa (supra),*** *and* ***Joseph Ungadi Kodera vs Ebby Kangisha Kavai, KSM C. A. No. 239 of 1997 (ur).***

> The appellant having conceded to the general proposition regarding the award of damages for breach of contract, it was incumbent upon it to lead evidence so as to bring the respondent's conduct into the exceptions it alluded to above. In this case the mere fact that the appellant wrote several letters to the respondent without remedial measure being undertaken immediately cannot amount to oppressiveness, insolent or vindictive behaviour. The correspondence was responded to explaining what was being undertaken. The fact that the respondent took no corrective action only making incessant promises that the issue was under investigations is not of itself evidence of high handedness, outrageous, or insolent conduct. Further there was no agreement at the time as to the real cause of power outages. There was a blame game between them which went on for a long time. In those circumstances we do not see how the respondent can be accused of being oppressive, high handed, outrageous, insolent or even vindicative".

The Court of Appeal does not rule out there are exceptions to the General proposition regarding the award of Damages for breach of Contract.

18. Back to the matter at hand. It was not clear whether Fit Tight sought General or Special Damages. If it was the latter, it failed to specifically plead as expected. If it was the former, then, it failed to plead and establish that the conduct of the Bank fell within the exceptions, for example that it was oppressive, insolent, highhanded, outrageous or vindictive. The need to plead this conduct is informed by the need to give the other party an opportunity of confronting that accusation during the hearing.

19. Whichever way this matter is looked at, the Court reaches a decision that the Plaintiff Claim fails. It is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 10th day of May ,2018.

F. TUIYOTT

JUDGE

PRESENT;

Were for Plaintiff

Muchamu h/b Kipkorir for Defendant

Nixon - Court Assistant